IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

JOSEPH D. MEEHAN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

Brief For Respondent In Opposition

AFFIDAVIT OF JOSEPH D. MEEHAN

Joseph D. Meehan, being duly sworn, deposes and says:

1. I am a citizen of the United States and the respondent in the above-entitled action.

2. I desire to oppose the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts to contend that the Supreme Judicial Court of Massachusetts did not err in its judgment of March 19, 1979, pursuant to Rule 24

of the Rules of this Court, but because of my poverty I am unable to pay the costs of such opposition or to give security therefor and still be able to provide myself with the necessities of life.

3. I believe that the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts should not be granted.

4. I believe that I am entitled to oppose the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts.

The nature of the question to be presented upon such opposition is as follows:

> There is no federal question of substance presented to this Court that has not been determined by this Court or that has not been decided in a way not in accord with the applicable decisions of this Court. There are no special or important reasons to review the decision of the Supreme Judicial Court of Massachusetts.

I contend that the Supreme Judicial Court of Massachusetts did not err in holding that the defendant's confession was involuntary and inadmissible, that the suppressed confession cannot justify the issuance of a search warrant and that the defendant's afternoon statement must be suppressed.

WHEREFORE, affiant prays that he may have leave to proceed in this Court in forma pauperis.

Joseph D. Meehan

Joseph D. Meehan

Commonwealth of Massachusetts
Suffolk, ss.
August 3 , 1979

Then personally appeared the above Joseph Meehan who made oath to the truth of the foregoing statements.

Before me,

Notary Public

My Commission Expires:
October 16, 1981

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COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

JOSEPH D. MEEHAN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Brief For Respondent In Opposition

Motion For Leave To Proceed In Forma Pauperis

Respondent moves the Court for an order permitting him to proceed in this Court, in forma pauperis with his brief in opposition to the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts to contend that the Supreme Judicial Court of Massachusetts did not err in its decision of March 19, 1979, pursuant to the provisionsof Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent.

Respondent's brief in opposition is being filed with the motion and with respondent's affidavit.

David A. Mills
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Mills & Teague
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Boston, MA 02110
482-4501

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

JOSEPH MEEHAN,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Brief For The Respondent In Opposition

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Steven G. Doyle
Legal Intern To
David A. Mills

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

V.

JOSEPH MEEHAN,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Questions Presented

I. Whether this Court ought to grant certiorari to review the factual finding of a trial court.

II. Whether this Court ought to grant certiorari to review a case that presents an issue decided in accordance with the holding in a case that was recently affirmed by this Court.

III. Whether this Court ought to grant certiorari to review a case that presents no novel questions of law or that presents no issues that may be construed as having been decided in a way that is not in accord with the appropriate decisions of this Court.

Statement Of The Case

The facts of this case are set forth in the opinion of the Supreme Judicial Court, Commonwealth v. Meehan, 1979 Mass. Adv. Sh. 710 at 711-729. The facts are also set forth in a "Memorandum of Decision" of the trial judge who heard the evidence. These decisions are reprinted in the Appendix to the Petition at 3a-40a.

The questions raised in this Court were raised by means of a motion to suppress, and the trial court's findings of fact and rulings on the motion to suppress are contained in the memorandum that is reprinted in the Appendix to the Petition at 23a-40a. That court inquired whether the defendant's statement to the police was voluntary and whether there was any violation of the Miranda rule. The court stated:

> In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976 (a total of 24 tablets), and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer; such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up tolerance in a constant drug user; the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his

> responses thereto; the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Keely, as contained in Exhibit 14, Pages 29 to 48, inclusive.

Appendix to Petition, 31a.

Based on his evaluation of the evidence presented to him first hand, the trial judge concluded:

> That the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety.

Appendix to Petition, 37a.

The Massachusetts Supreme Judicial Court reviewed the details leading to this factual finding. That Court acknowledged that many factors may be considered while determining the voluntariness of the statement, and it concluded that it shouldn't interfere with the judge's conclusion. Appendix to Petition, 17a-18a.

The Supreme Judicial Court also held that the search warrant, which relied solely on the involuntary confession to justify its issuance, could not legalize the seizure of the defendant's dungarees. That Court also held that the defendant's subsequent, in-custody statement to his mother was consequent upon the involuntary confession and therefore inadmissible. Appendix to Petition, 18a-21a.

Reasons For Denying The Writ

I. THIS COURT SHOULD NOT REVIEW THE FACTUAL FINDING OF THE INVOLUNTARINESS OF THE DEFENDANT'S CONFESSION.

The defendant submits that this Court should not review the voluntariness of the confession because the Commonwealth has raised only a question of fact that has been decided below. Where the only relevant issues that are raised on a writ of certiorari are factual issues, the writ should be dismissed. Tacon v. Arizona, 410 U.S. 351 (1973). This Court stated in United States v. Johnston, 268 U.S. 220, 227 (1925) that "We do not grant certiorari to review evidence and discuss specific facts."

A Justice of the Superior Court (the trial court) found that the defendant's statement was not voluntary. He determined, because the defendant's statement was "so infected with" the "overpowering broadside upon the defendant" by the police interrogating in very skillful police trained language, that the statement to the police "was neither voluntary nor was it carried out with the principles of the Miranda case in mind." Appendix to Petition, 37a. The Supreme Judicial Court decided that the trial court judge's conclusion that the confession was involuntary and inadmissible should not be interfered with. Appendix to Petition, 18a.

The Commonwealth acknowledges that the lower court must examine the "totality of the circumstances" to determine whether the confession was given voluntarily. The trial court below found that under all the factors, which included the defendant's age, his educational background, his maturity and his consumption of a quantity of Valium and beer, the defendant was overpowered by the skilled questioning of a trained police officer. To this factual finding the Court below merely applied the standard of law that involuntary statements that are procured contrary to the principles of Miranda should be suppressed.

It appears that the Commonwealth contests the factual finding by the trial court of the statement's involuntariness. The Commonwealth claims that because each separate factor is not in itself coercive, a court could not find that the statement was involuntary. The petitioner suggests that this is an improper standard.

In Fikes v. Alabama, 352 U.S. 191, 197 (1957), this Court adopted the phrase, "totality of the circumstances" in deciding the voluntariness of a confession specifically to underscore that the question of voluntariness may not always be answered by only considering overt evidence of coercion such as evidence of physical brutality. There this Court found involuntariness by weighing the pressure applied to the defendant against his power of resistance. To require a court to limit its examination of the "totality of the circumstances" to factors that are in themselves coercive would strip the phrase of all meaning. A trial court must examine each item of evidence for the precise reason of determining if the entire situation is coercive.

II. THIS COURT RECENTLY AFFIRMING A DECISION, MASSACHUSETTS V. WHITE, [439 U.S. 280 (1978) AFFIRMED BY AN EQUALLY DIVIDED COURT, COMMONWEALTH V. WHITE, 1977 MASS. ADV. SH. 2805, 371 N.E. 2d 777] THAT HOLDS THAT AN INVOLUNTARY STATEMENT MAY NOT BE USED TO ESTABLISH PROBABLE CAUSE FOR A SEARCH WARRANT, AND THEREFORE, THE ISSUE HAS BEEN DECIDED.

A search warrant relying solely on a statement taken in violation of the Fifth Amendment must be invalidated. In Commonwealth v. White, 1977 Mass. Adv. Sh. at 2812, 371 N.E. 2d at 781, the Supreme Judicial Court of Massachusetts decided whether statements procured in violation of the commands of Miranda, "despite their inadmissibility at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant." The Massachusetts court concluded, and this Court affirmed the conclusion, that the

statements may not be used for that purpose. Id. at 2812, 371 N.E. 2d at 781; and Massachusetts v. White.

In that case the trial judge concluded that the defendant, in his intoxicated condition, had not knowingly and intelligently waived his right to counsel or his privilege against self-incrimination. The Massachusetts court explained why the search warrant had to be invalidated:

> To hold otherwise would, in effect, sanction the initial violations of constitutional guarantees which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called 'fruit of the poisonous tree' doctrine set forth in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); and Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307 (1939).
>
> 1977 Mass. Adv. Sh. at 2812, 371 N.E. 2d at 781.

The facts in the instant case are substantially indistinguishable. The defendant's involuntary statement was the only evidence offered to obtain a search warrant. Therefore, following Massachusetts v. White, supra, the search warrant was invalid.

The respondent acknowledges that the judgment offered by an equally divided Court is not "entitled to precedential weight..." Neil v. Biggers, 409 U.S. 188, 192 (1972). The respondent merely submits that the fact that this Court has so recently reviewed this precise issue should be included in the consideration of this petition.

III. THE PETITIONER HAS NOT PRESENTED ANY NOVEL OR SUBSTANTIAL QUESTIONS OF LAW, NOR HAS THE COMMONWEALTH SHOWN THAT THE INSTANT CASE HAS BEEN DECIDED IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. Massachusetts v. White, although affirmed by an equally divided Court, has support both in case law and in policy.

1. This Court has applied the "fruits of the poisonous tree" doctrine in Fifth Amendment violations.

The "fruits of the poisonous tree" doctrine has often been applied to Fifth Amendment and Miranda v. Arizona, 384 U.S. 436 (1966) violations. In Harrison v. United States, 392 U.S. 219 (1969), this Court stated:

> Here ... the petitioner testified only after the government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principles that prohibit the use of confessions so procured also prohibits the use of any testimony impelled thereby - the fruit of the poisonous tree to invoke a time-worn metaphor. For the 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392.

392 U.S. at 222.

Moreover, in Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974), cert. den. 421 U.S. 963 (1975) the Fifth Circuit holding was left unchallenged by this Court:

> There can be no doubt that the Silverthorne principle announced in a search and seizure context is applicable to a suppressed confession case, Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed. 2d 1047 (1969); or that its exclusionary effect applies not only to tangible evidence but also to the testimony of witnesses.

498 F.2d at 629.

Where, as here, there is an actual violation of the Fifth Amendment and the principles of the Miranda case and not merely a technical violation of the Miranda requirements, the exclusionary doctrine should apply to the tainted fruits of testimonial evidence. See Parker v. Estelle, supra; United States v. Massey, 437 F. Supp. 843, 860 (M.D. Fla. 1977); Michigan v. Tucker, 417 U.S. 433 (1974); United States ex rel Hudson v. Cannon, 529 F.2d 890, 892-893 (7th Cir. 1976). The conclusion by the Supreme Judicial Court that the seizure of

the dungarees cannot be legalized by the search warrant relying on the involuntary confession is entirely consistent with this Court's decisions.

The government has the burden of showing that the evidence obtained is not the fruit of the poisonous tree. A lower court, in United States ex rel Sanders v. Rowe, 460 F. Supp. 1128 (N.D. Ill. E.D. 1978), stated:

> The fruits of the poisonous tree doctrine requiring the exclusion of tainted fruit of police conduct abridging constitutional rights derives from Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). Once a defendant makes a prima facie showing of unconstitutional conduct by the government in obtaining its evidence, the burden shifts to the government to demonstrate either that it did not in fact obtain any later evidence by exploiting the primary illegality or that any causal connections had become so attenuated that the taint was desicated ...

460 F. Supp. at 1137.

The respondent suggests that the language quoted is applicable to the instant case and consistent with the law of this Court.

2. The Search Warrant Was Not Purged Of The Taint Of The Primary Illegality.

Initial police misconduct must be at a sufficient remove from the ultimate acquisition of evidence for the evidence to be admissible. In Wong Sun v. United States, 371 U.S. 471 (1963), this Court explained that in applying this concept of "purging the taint of the primary illegality," the question is:

> Whether, granting establishment of the primary illegality, the evidence ... has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

371 U.S. at 487-488.

As Mr. Justice Powell explained in Brown v. Illinois, 422 U.S. 590, 609 (1975) (concurring opinion):

> The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost.

In the instant case, the information from the involuntary statement was used as the basis for probable cause in a search warrant. The complete lack of any attenuation from the primary illegality shows that the lower court's decision was within the reasoning of this Court's decisions.

3. In The Instant Case, The Application Of The Exclusionary Rule Will Deter Future Police Misconduct.

This Court has limited the use of the exclusionary rule to areas where police misconduct will be deterred. United States v. Calandra, 414 U.S. 338 (1974). As recognized in Stone v. Powell, 428 U.S. 465 (1976), the exclusionary rule articulated in Mapp v. Ohio, 367 U.S. 643 (1961) is a pragmatic rule:

> The Mapp majority justified the application of the rule to the states on several different grounds [footnote omitted] but relied principally upon the belief that exclusion would deter future unlawful police conduct ....

428 U.S. at 484.

In the present case the deterrent effect of excluding the evidence would be great. If a search warrant could be based on involuntary confessions, the police would be encouraged to violate the defendant's Miranda and Fifth Amendment rights in order to locate physical evidence of the crime. After a defendant has been interrogated by all means known to the police and after he has given an involuntary statement under all that pressure, the police could use the

statement to get a search warrant to secure evidence for trial. The police must not be allowed to benefit from their violation of the defendant's Fifth Amendment rights by using this violation to secure a search warrant.

The holding in Spinelli v. United States, 393 U.S. 410 (1969) has no effect here. In that case hearsay evidence was held acceptable for determining probable cause in a search warrant. Excluding hearsay would not deter any police misconduct; therefore, no analogy may be made to the application of the exclusionary rule.

4. The Holding In Michigan v. Tucker, 417 U.S. 433 (1974) Does Not Control.

The Commonwealth contends that the statements taken in violation of Miranda need not be excluded from all proceedings. This Court has ruled that when evidence that has been acquired during the commission of a technical violation of the Miranda rule leads to testimony that is voluntarily given and is otherwise trustworthy, the testimony need not be excluded. Michigan v. Tucker, 417 U.S 433 (1974).

One of the factors that the Court evaluates in deciding whether to allow testimony of a witness who was discovered through an involuntary confession is the willingness of the witness to freely testify. United States v. Ceccolini, 435 U.S. 268, 277, 98 S.Ct. 1054, 1060 (1978). The witness may exercise free will and offer testimony of her own volition.

The respondent believes that the Court in Ceccolini realized that the question of free will is not the same in the case of physical evidence discovered

as a result of inadmissible evidence as it is in the case of live witness testimony discovered as a result of inadmissible evidence. The Court postured that "the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence." 435 U.S. at 277, 98 S.Ct. at 1060. This is, in part, because the physical evidence itself has no free will. There is no doubt that the physical evidence will not come in and offer testimony of its own volition. This Court concluded that:

> [T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and a discovery of a live witness than when a similar claim is advanced to support the suppression of an inanimate object.

435 U.S. at 280.

It follows from the fact that the exclusionary rule is invoked with greater reluctance where inadmissible statements lead to live witness testimony than where inadmissible statements lead to physical evidence that Michigan v. Tucker, supra, cannot control.

B. The Defendant's Afternoon Statement Must Be Suppressed Because It Was Not Sufficiently Insulated From The Initial Illegality.

A statement elicited from a defendant that is a product of police misconduct must be suppressed. Clewis v. Texas, 386 U.S. 707 (1967); United States v. Bayer, 331 U.S. 532 (1947). The Court must look to several factors in determining a statement's admissibility. In Brown v. Illinois, 422 U.S. 590 (1975), where the initial misconduct was an illegal arrest, this Court said:

> No single fact is dispositive ... the temporal proximity of the arrest and confession, the presence of intervening circumstances, see Johnson v. Louisiana, 406 U.S. 356 (1972), and particularly the purpose and the flagrancy of the official misconduct are all relevant. See Wong Sun v. United States, 379 U.S. at 491. The voluntariness of the statement is the threshold question.

422 U.S. at 609.

This Court did not dispute the holding in United States v. Gorman, 355 F.2d 151 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) when the Second Circuit Court realized that:

> After a first confession has been extracted from a man previously professing his innocence by a means calculated to break his will, a second confession is more likely secured. In such a case there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time.

355 F.2d at 157.

The period of time elapsed was too short to provide sufficient insulation between the illegal act by the police and the afternoon statement by the defendant. Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). A two-hour lapse of time has been held to be insufficient time. Brown v. Illinois, supra; Randall v. Estelle, 492 F.2d 118 (5th Cir. 1974). Courts have considered this issue when there has been as much as a six-month delay between statements. United States v. Bayer, 331 U.S. 532 (1947); Goldsmith v. United States, 277 F.2d 335 (1960), cert. denied 364 U.S. 863 (1960). The lapse of only a few hours would not give the defendant enough time to be insulated from the factors of his late-morning

coerced confession and therefore the afternoon statement must be suppressed as a product of the police misconduct.

Where there was no change of circumstances that would insulate the defendant from the police misconduct, and where the conditions do not create a break in the stream of events, a subsequent confession will not be considered voluntary. Clewis v. Texas, supra; Knott v. Howard, 511 F.2d 1060 (1st Cir. 1975). Here, the defendant had not seen his attorney. He was still in custody in the police station. He spoke before he had a chance to confer with his family. There was no change of circumstances and thus no break in the stream of events before he made the afternoon statement; therefore, the statement cannot be distinguished from the late-morning confession.

The statement should be suppressed even though the police did not actually ask the defendant any question. Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964); Copeland v. United States, 343 F.2d 287 (D.C. Cir. 1965) (Bazelon, C.J., concurring in part and dissenting in part). In Ricks, the Court said, "The questioning which preceded Ricks' statements precludes any claim that they constituted 'spontaneous threshold confessions.'" 334 F.2d at 968. Moreover, the burden was on the government to show the circumstances insulating the statement from the confession. Brown v. Illinois, supra at 604.

Under the circumstances of the second statement, namely the short time between statements, the defendant's condition, the absence of any other change, the state has failed to prove that the defendant has been insulated from his initial confession to allow the second statement to be admitted.

Conclusion

Pursuant to Rule 19 of this Court, certiorari should only be granted for special and important reasons. The petition has only raised issues of fact, issues of law that have already been decided by this Court and issues of law that are entirely consistent with decisions of this Court. While the respondent recognizes that review on certiorari is a matter of sound judicial discretion, he submits that the instant case presents no issues appropriate for review.

Respectfully submitted,

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